ESTATE WEGE, *Appellant* v. STRAUSS, *Respondent*.

1931. *October* 22, 27. WESSELS, A.C.J.; STRATFORD, J.A.; ROOS, J.A.; and HUTTON, A.J.A.

Gaming and wagering.—Horseracing.—Legality of betting contract.—Act 36 *of* 1902 *(Cape).—Insolvency.—Disposition without value.—Payments to bookmaker in settlement of lost bets.—Voidable preference.—Payment of lost bets long overdue.—Ordinary course of business.—Act* 32 *of* 1916 *sections* 24, 27.*—Statute.—Words taken from English statute.—Construction.*

Section 11 of Act 36 of 1902 (Cape) which provides that wagering contracts shall be null and void does not make such contracts illegal, but merely makes them unenforceable between the parties to the contract.

The payment of money to a bookmaker in settlement of bets on horseraces is not a disposition without value in terms of section 24 of the Insolvency Act 32 of 1916.

It is not in the ordinary course of a bookmaker's business to allow the settlement of debts due by a client to stand over for an unlimited period; if this is done and a client whose liabilities exceed his assets pays a betting debt long overdue he does not do so in the ordinary course of business within the meaning of section 27 of Act 32 of 1916.

The principles followed by the Court in construing a section of a statute taken over from an English statute discussed.

The decision of the Cape Provincial Division in *Estate Wege* v. *Strauss*, confirmed.

Appeal from a decision of the Cape Provincial Division (GARDINER, J.P.).

The facts appear from the judgment of WESSELS, A.C.J.

W. H. Mars, K.C. (with him *J. E. de Villiers*) for the appellants: The payments attacked were dispositions not made for value in terms of sec. 24 of Act 32 of 1916, as they were null and void by virtue of sec. 11 of Act 36 of 1902 (Cape). See sec. 18 of 8 and 9 Vict. C. 109 (the Gaming Act of 1845); Anson on *Contracts* Chap. V sec. 1 (pp. 212-9 of the 12th Ed.) and authorities there cited; Halsbury's *Laws of England* (Vol. XV, pp. 271-2); *Cocking* v. *Ward* (1 C.B. at p. 870 and 68 R.R. at p. 839); *Fetch* v. *Jones* (5 E. and B. 238 and 103 R.R. 455); *Ward* v. *Fry* (85 L.T.R. 394); *Garson* v. *Cole* (26 T.L.R. at p. 469); *Sutters* v. *Briggs* (1922, 1 A.C. 1); *Joe Lee Ltd.* v. *Lord Dalmeny* (1927, 1 Ch. 300); *Saffery* v. *Mayer* (1901, 1 Q.B. 11); *Hyams* v. *Stuart-King* (1908, 2 K.B. 696 at p. 728); *Chapman* v. *Franklin* (21 T.L.R. 515); *Tatam* v. *Reeve* (1893, 1 Q.B. 44); *Graham* v. *Green* (1925, 2 K.B. 37); sec. 83 of Ordinance 6 of 1843 (Cape); *Mosley N. O.* v. *Meyer* (1908, O.R.C. 93); *Bloom's Trustee* v. *Fourie* (1921, T.P.D. at p. 601); *Silver* v. *Standard Bank* (1923, O.P.D. 126); *van Rensburg* (1923, E.D.L. 200); *Hurley* v. *Muller* (1924, N.P.D. 121); *Dickman* v. *Flederman & Lazarus* (1926, C.P.D. 335); and *Fisher* v. *Straiton* (1920, W.L.D. at pp. 56-7).

R. B. Howes, K.C. (with him *P. T. Lewis*) for the respondent: A promise to pay on the happening of a particular event is value for a promise to pay if the event should happen and therefore betting transactions are dispositions for value. Moreover there is further value because such a promise could have been sold. See Salmon & Winfield on *Contracts* (p. 161); *Sutter* v. *Briggs* (*supra*) was decided on an old statute. See *In re O'Shea* (1911, 2 K.B. 981).

The fact that a betting transaction is unenforceable at law does not deprive it of value. Unenforceability is not the test under sec. 24 of Act 32 of 1916. A donation at which the section is aimed is enforceable at law. Sale of liquor on credit for consumption on the premises was made unenforceable by sec. 68 of Act 28 of 1883 (Cape), but was nevertheless for value as it could be set off. See *Gordon* v. *Haefele* (1914, C.P.D. 909). The present liquor Act 30 of 1928 has similar provisions in secs. 109 and 111. There is at least a *naturalis obligatio*. See *Voet* (44.7.3) and *Dodd* v. *Hadley* (1905, T.S. 439).

Our insolvency law differs from the English Bankruptcy Law and the meaning of the word " value "in our Act is not limited by the technical requirements of the phrase " valuable consideration " in English law, one of which is enforceability.

The betting transaction must be taken as a whole. See *Hurley* v. *Muller* (*supra*).

Recovery of the payments under sec. 24 of Act 32 of 1916 would be in conflict with the provisions of sec. 11 of Act 36 of 1902 (Cape).

If the appellants' contention is correct, it would result in gross inequity for the following reasons: respondent could not recover what he had lost to Wege and would have to repay what he won; bets made by Wege for others merely as agent would unlawfully enrich Wege's estate; if a bookmaker became insolvent, the amount he had paid out on winning bets could be recovered by his estate and in practice the direct result of the sequestration of a bookmaker's estate would be to make his estate solvent; a debtor anticipating insolvency has only to bet extensively to assure that

his creditors will be paid in full, as what he wins he can keep and what he loses his estate can recover; a bookmaker's business is licensed and supervised by the Provincial authorities and heavily taxed, and taxes will have been paid by respondent on the amount which the appellants are seeking to recover in full.

Sec. 24 (1) is not imperative and the Court will not enforce an inequitable claim by the appellants who are officers of the Court.

On the cross appeal: A payment by a punter to a bookmaker is in the ordinary course of business even if not made on "settling day." See *Fouries Trustee* v. *van Rhyn* (1922, O.P.D. 1); *Malherbe's Trustee* v. *Dinner & Others* (1922, O.P.D. 18); *Dreyer's Trustee* v. *Hanekom* (1919, C.P.D. 196); *Lewin's Trustee* v. *Brenner* (1930, E.D.L. 295).

As to costs respondent won in the court below on the main issue which was a test case and he should at least have been awarded costs in connection with the issue on which appellant failed, as the issues were severable. See *Fripp* v. *Gibbon & Co.* (1913, A.D. 354); *Clarke* v. *Bethal Co-operative Society* (1911, T.P.D. 1152); *Union Share Agency and Investment Ltd.* v. *Green* (1926, C.P.D. 129) and *Bowhay* v. *Ward* (1903, T.S. 772 at p. 782 *ad fin.*).

Mars, K.C., on the cross appeal: The payments were not in the ordinary course of business. See *Jacobson & Co's. Trustees* v. *Jacobson* (1920, A.D. 75); *Sperryn's & Dommisse's Trustee* v. *National Bank of S.A. Ltd.* (1923, T.P.D. 166); *National Bank of S.A. Ltd.* v. *Hoffman's Trustee* (1923, A.D. 247); *Chin's Estate* v. *National Bank of S.A. Ltd.* (1915, A.D. 353); *Fuller's Trustee* v. *Standard Bank of S.A. Ltd.* (1922, N.P.D. 478 at p. 484); *Estate van der Westhuizen* v. *van der Westhuizen* (1923, C.P.D. 70).

The issues were not severable and no tender was made by respondent. See *Natal Bank Ltd.* v. *Rood* (1909, T.S. 243 at p. 262) and *Clarke* v. *Bethal Co-operative Society* (*supra*).

The discretion as to costs was judicially exercised, nor were any special circumstances shown entitling respondent to a separate order as to costs. See *Fripp* v. *Gibbon & Co.* (*supra*); *Russouw* v. *West* (1927, C.P.D 344 at p. 347); *van Staden* v. *Botha* (1928, C.P.D. 264) and *Kock* v. *Realty Corporation of S.A.* (1918, T.P.D. 356) and *Swanepoel* v. *van der Westhuizen* (1930, T.P.D. 806).

Cur. adv. vult.

Postea (October 27th).

WESSELS, A.C.J.: The appellants in their capacity as joint trustees in the insolvent estate of J. F. Wege sued the respondent in the Cape Provincial Division for payment of a certain sum of money. The ground of action alleged in the declaration is that during the period from 1st October, 1928 to 4th June, 1930, when the insolvent Wege's liabilities exceeded his assets, he made several payments to the respondent all of which were dispositions of property not made for value in terms of sec. 24 of Act 32 of 1916. There is an alternate claim to set aside a portion of the payments, viz, £514, paid on the 3rd June, 1930 as an undue preference. The respondent pleaded to the first claim that the payments were made by Wege to him in settlement of bets on horseraces, and were therefore dispositions of money for value. On the alternative claim the respondent pleaded that £400 was given to Wege as a loan and £114 was payment in respect of money owing for unpaid bets, that there was no intention to prefer, and that the payment was made in the ordinary course of business.

The material facts are briefly as follows: Wege's estate was sequestrated on 3rd September, 1930. From October 1st, 1928, to September 3rd, 1930, Wege's liabilities at all times exceeded his assets. The respondent Strauss was a member of the Tattersall's Club in the Cape Province and his calling was that of a licensed bookmaker. During the years 1928 to 1930 Wege had a number of betting transactions with Strauss, and the court below found as a fact that £1476 in all was paid by Wege to Strauss, of which a sum of £1076 was for bets on credit and £400 for a loan. £50 of the £1076 was paid on 22nd April, 1930. During the period abovementioned Strauss paid Wege more than Wege paid him on credit bets, so that in respect of bets made between them Wege was the gainer. The Court came to the conclusion that the payment of a bet is a disposition of money for value, and therefore the money paid by Wege, except that part which constitutes an undue preference, cannot be recovered by his trustees, nor can the £400 be claimed back as the latter was repayment of a loan. The Court, however, found that the payment of £164 of the £1476 constituted an undue preference, and that amount the respondent was ordered to pay back with interest *a tempore morae*. From this order the trustees have appealed to this Court, and the respondent has noted a cross appeal claiming that the judgment as regards the £164 is wrong and also that he should not have been ordered by the Court below to pay all the costs of the action.

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The appellants base their appeal on the ground that in the Cape Province a bet is an agreement which is null and void, and therefore money paid under such an agreement can never be considered as a disposition for value. Mr. *Mars* argued that we must distinguish between an agreement which by statute is null and void and one which merely provides that no action shall be brought on it. In the former case the agreement is regarded by the law as if it did not exist and therefore money paid under it can never be a disposition for value. Sec. 11 of Act 36 of 1902 (Cape), upon which this argument is based, reads as follows:—

> "All contracts, agreements, whether verbal or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which has been deposited in the hands of any person to abide the event in which any wager has been made."

The learned Judge in the court below came to the conclusion that this section does not alter our common law as laid down by the Transvaal Court in *Dodd* v. *Hadley* (1905, T.S. 439), and that it does not make betting illegal. Mr. *Mars* contends that the section should be interpreted in accordance with English law inasmuch as it corresponds almost word for word with sec. 18 of 8 and 9 Vict. C. 109, and the English Courts have held that contracts by way of gaming or wagering are null and void, and therefore the payment of a bet is in effect a voluntary payment. He contends that we ought to follow the case of *Ward* v. *Fry* (85 L.T. 394), and hold that the money was paid by Wege to Strauss for a debt not recoverable at law and therefore as against the trustee in insolvency it must be considered as a payment not for value.

The first question is whether our courts ought to interpret a section of a statute manifestly taken over from an English statute in the same way as it has been interpreted in English courts. It may be stated as a general proposition that our courts would, as a general rule, follow the authoritative interpretation of a section in an English statute as laid down by the higher English courts if that section occurs in a Union statute which in all its essentials is the same as the English statute in which the section occurs. If the decision is one of the Privy Council, and there is no difference

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between the Union statute and the English statute and if there is nothing in our common law which would require a different interpretation, then we would follow the decision of the Privy Council; and if an interpretation has been put upon a section of an English statute by one of the higher English courts, we would attach great weight to such an interpretation. But if our Legislature takes over a section of an English statute, that section will have to be interpreted in the light of our common law in exactly the same way as if it had not occurred in an English statute. The draftsman of a Union statute may find it convenient to use the same words as a similar section in an English statute, but it does not follow that our Legislature must be considered to have thereby incorporated not only the words of the section but the meaning which English courts have given that section as interpreted in the light of English common or statute law.

Now with regard to the words "null and void" occurring in sec. 11 of the Cape Wagering Act, it was pointed out by CURLEWIS, J. in *Dodd* v. *Hadley* that some of our authorities use the very words of sec. 11 and say of wagering contracts that they are "nul en krachteloos." It is quite clear that according to our common law a bet was not regarded as illegal, nor does our common law regard it as null and void in the sense that no claim whatever can be based upon it. In *Dodd* v. *Hadley* the Court had to determine whether a bet had or had not been made by Dodd with a bookmaker on behalf of Hadley, and if so made, whether Hadley was or was not entitled to recover the proceeds of the bet from Dodd to whom the money had been paid by the bookmaker on behalf of Hadley. It held that Hadley could recover from Dodd the money so paid. A bet, therefore, is not illegal by our law, though it is not enforceable in our Courts between the parties to it, and when we speak of a wagering contract being null and void we mean no more than that our Courts will not lend their aid to its enforcement.

But the case of *Ward* v. *Fry*, upon which Mr. *Mars* has laid much stress, is in no way *in pari materia* with the present appeal. The decision of that case depended not only on the fact that by sec. 18 of 8 and 9 Vict. C. 109 wagering contracts are in England null and void, but upon the special provisions of the English Bankruptcy Act in force in England in 1901,—an Act which differs very materially from our insolvency Acts. The decision in *Ward* v.

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Fry depended not only on sec. 18 of the Wagering Act but also on three sections of the Bankruptcy Act containing provisions which are not found in our Insolvency Acts. The decision is based on the fact that by a series of decisions it has been established in England that "the trustees can sue the person to whom the bankrupt has paid moneys which, by virtue of the bankruptcy, have become the property of the trustee by relation back without showing wrongfulness or fraud or other ground of general equity against the recipient." (*Per* WRIGHT, J.): Sec. 43 of the English Bankruptcy Act makes the bankruptcy of the debtor relate back to the first act of bankruptcy. Sec. 44 provides that everything, with certain exceptions, which belong to or is vested in the bankrupt at the time of bankruptcy (i.e. at the time of the act of bankruptcy) shall be divisible among his creditors. Sec. 49 provides that the creditors cannot lay claim, *inter alia*, to conveyances, assignments or contracts made for valuable consideration provided two conditions have both been complied with,—(1) that the payment was made before the receiving order, and (2) that the payee had no notice of an act of bankruptcy by the bankrupt. The Court decided that the word "contract" in sec. 49 means a contract which involves a legal obligation and therefore does not include gaming contracts. If our Insolvency Acts contained provisions similar to the English Bankruptcy Act, the case of *Ward* v. *Fry* might perhaps have been of assistance to us, but as this is not the case and as sec. 24 of Act 32 of 1916 has no resemblance to any of the sections quoted, the case of *Ward* v. *Fry* can give us no assistance. There is no section in the English Bankruptcy Act which corresponds exactly with sec. 24. What we have to determine in this appeal is whether money paid to a bookmaker is a disposition of property without value. What is meant by value? It certainly does not bear the same meaning as valuable consideration in English law. There is nothing in the Insolvency Act which would lead us to infer that the Legislature meant to give some technical meaning to the word "value." It can therefore only mean value in the ordinary sense of the word. We have therefore to ascertain whether a promise under a bet can be said to have value and whether payment of a bet to a bookmaker can be said to be a payment for value in the ordinary sense of the word. A racing bet with a bookmaker is a promise to pay money to the bookmaker if a certain horse loses and a promise on the part of the bookmaker to pay if the horse

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wins. The promises are mutual, and the one promise is the *quid pro quo* for the other. In its essence a bet does not differ from an insurance, and in former times insurances were placed on a par with wagers. In both cases there is a promise to pay money on the happenings of an event. Our law however has thought fit to recognise claims arising out of insurance contracts and stock exchange transactions, whereas it has refused to assist the recovery of money arising out of wagers. There can be no doubt that the payment of an insurance premium or of money under the policy would be a disposition for value. It is unnecessary to labour the point that the promise to pay a sum of money if a certain horse wins may be an exceedingly valuable right or asset. A bet is not the less of value because its value is a speculative one. Does the fact that a bet cannot be enforced in a Court of law make the promise to pay one of no value? The law does not regard a bet as a *turpis causa*: It is not an offence and there is no moral obloquy attached to betting on horseraces. In fact the law recognises that bets are freely made, and the Cape Province has passed an Ordinance (8 of 1921) by which bookmakers are licensed and taxed, and by which betting on horses is regulated. This Ordinance provides that the Administrator may make regulations *inter alia* for empowering certain committees to settle any dispute which may arise in connection with the carrying on of betting (15) (*f*). I adopt what was said by the learned Judge in the court below:—

> "But then it is said that Wege got no value, for he could not enforce defendant's promise in a Court of law. I see no good reason for making value depend upon the existence of a legal sanction. There may be other sanctions which will secure just as effectively the carrying out of an obligation. In this particular case there was a very powerful sanction. Under the rules of Tattersall's, if defendant defaulted, he would lose his rights as a member—a powerful inducement to him to pay. In addition to this, bets by Wege at any meeting with defendant were guaranteed by the bookmakers' association up to £500—see rule 10. According to Mr. Langerman, who has been chairman of Tattersall's for five or six years, in his time there has never been an occasion where a bookmaker has made default. Wege was an attorney, and could recover judgment for his fees in a Court of law, but when he got judgment and took out execution he might be met by a return

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of *nulla bona*. The legal sanction would not yield him his money. But in the case of his bets a far more powerful sanction operated, and if he won he was practically certain of his money. The fact that the law will not assist does not, in my opinion, deprive defendant's promise to Wege of value."

In considering whether a disposition is for value within the meaning of sec. 24 we must look to the time when the promise was made and not to the time when the payment in consequence of the promise takes place, otherwise many payments by a person whose liabilities exceeded his assets would be a disposition of property not for value, unless enforceability is the test of value, which it is not. The object of sec. 24 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or contingent advantage in return. In these circumstances the conclusion of the learned Judge that the trustees' case under sec. 24 of the Insolvent Act of 1916 must fail is quite correct. The view contended for by the appellants would give rise to many extraordinary anomalies. If a bookmaker becomes insolvent and made bets whilst his liabilities exceeded his assets, his trustee in insolvency could recover all payments made by him within two years of his insolvency as being dispositions of property not for value. In this very case we are dealing with, Wege received more money in credit bets from Strauss (the only bets of which there is any record) than the latter got from Wege, so that if appellants' contention is accepted, Wege's creditors would be benefitted by his winnings and would still be able to get Wege's losses from Strauss.

The next question to consider is the cross-appeal with regard to the £164 set aside as an undue preference. The learned Judge came to the conclusion that this payment was not made in the ordinary course of business, and that therefore it should be set aside under sec. 27 of Act 32 of 1916. The facts in connection with this cross-appeal are briefly these. On November 30th, 1929 Wege owed Strauss £164 in bets. Strauss says he started worrying Wege for this amount and eventually in April, 1930 he paid off £50, so that there was still £114 owing. On the 23rd, May 1930 Wege wanted to borrow £400. Strauss refused to lend this money unless Wege paid him the £114 still owing. Thereupon Wege gave Strauss a cheque for £514 postdated to the 3rd, June and

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Strauss gave in return his own cheque for £400. This constituted a loan of £400 from May 23rd, to June 3rd, and a payment by Wege to Strauss of the £114 owing. Were these payments of £50 and £114 made in the ordinary course of business? Mr. *Howes* argued that we are not concerned with the nature of a bookmaker's business: we are to consider Strauss and Wege as creditor and debtor in a loan transaction in which the creditor refuses the loan unless the debtor is prepared to pay off an outstanding debt. This may be of importance in considering whether there was an intention to prefer, but does not apply to the question as to whether what was done was done in the ordinary course of business. He referred us to two case decided in the O.F.S. Provincial Division, ***Fourie's Trustee*** v. ***Dinner & Others*** (1922, O.P.D. 1) and ***van Eeden's Trustee*** v. ***Pelunsky*** (1922, O.P.D. 144). I cannot see that these cases help us to solve the question. All that they decide is that if a debtor pays a debt in accordance with the stipulations of his contract, then such payment is *prima facie* made in the ordinary course of business and you are not to strain the point that the person who made the payment was in pecuniary difficulties. In order to judge whether the £50 and the £114 were paid by Wege in the ordinary course of business we must take into consideration the fact that we are dealing with betting business between a bookmaker and his client. The fact that betting debts cannot be recovered in Courts of law, that bookmakers are subject to regulations, and that so important a racing club as Tattersalls (recognised in Ord. 8 of 1921) requires debts to be settled on fixed dates shows that the business relationship of a bookmaker and his client is a special kind of business. It is not in the ordinary course of a bookmaker's business to allow the settlement of debts to stand over for an unlimited period. If this is done, and a client whose liabilities exceed his assets pays a betting debt long overdue, he does not do so in the ordinary course of betting business within the meaning of sec. 27. As Wege paid the £50 and the £114 long after they should have been settled they were not paid in the ordinary course of this kind of business, and as the payment was made within six months of his insolvency at the time when his liabilities exceeded his assets, and as these payments had the effect to prefer Strauss above Wege's other creditors, they should be set aside as voidable preferences. The appeal and cross-appeal are therefore dismissed with costs.

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We have been asked to alter the judgment as to costs in the court below so as to make the plaintiff in that Court pay the costs on the main issue in which he failed and the defendant the costs on the alternative claim. This Court has on several occassions laid down that if issues are distinct and severable the successful party on each issue is as a rule entitled to his costs on that issue. This is a general rule which all Courts should follow, but it is not a hard and fast rule and considerable discretion must be left to the trial Judge in regard to costs. No doubt in this case there are some costs which could perhaps have been attributed to the main issue and some to the alternate claim, but there are also costs which are common to both issues and we are not prepared to say that in this case the learned Judge has not properly exercised his discretion. The order in the court below as to costs therefore stands.

The result is that both the appeal and the cross-appeal fail with costs in this court and the order as to costs in the court below stands.

Stratford, J.A., Roos, J.A., and Hutton, J.A., concurred.

Appeal accordingly dismissed.

Appellants' Attorneys: *Fuller, de Klerk & Osler*, Cape Town; *McIntyre & Watkeys*, Bloemfontein; Respondent's Attorneys: *Fairbridge, Arderne & Lawton*, Cape Town; *Kannemeyer & Jeffries*, Bloemfontein.

REX, *Respondent* v. AFRIKANER, *Appellant*.

1931. *October*, 27. Wessels, A.C.J.; Stratford, J.A.; Roos, J.A., and Hutton, A.J.A.

Criminal procedure.—Trial.—Perusal of record of preparatory examination by assessors.—Proclamation 20 *of* 1926 (*S.W.A.*).

Assessors sitting with a Judge in a criminal trial in South-West Africa under Proclamation 20 of 1926 (S.W.A.) are entitled to peruse the record of the preparatory examination in a case about to be heard by them.

Appeal upon a special entry in terms of sec. 370 of Act 31 of 1917 in the following terms. "The accused alleges that the

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proceedings in connection with the trial were irregular in that copies of the preparatory examination had, prior to the trial, been in the possession of and had been perused by members of the Court other than the presiding Judge."

The accused had been found guilty on a charge of murder before the Circuit Court for the Southern Circuit District of South-West Africa, a Judge and two assessors presiding.

N. Bryer, for the appellant.

W. C. S. Hoal, K.C. (*Attorney-General, O.F.S.*), for the Crown. See *R.* v. *Essa* (1922, A.D. 241).

Wessels, A.C.J.: The only question in this case is whether, when a Judge sits with assessors in South-West Africa, it is an irregularity for the assessors to read the record of the preliminary examination. It has already been decided in this Court that it is not an irregularity for the presiding Judge to read it. There seems to be a difference between the relative positions of the Judge and the assessors in the Union on the one hand and South-West Africa on the other. In the Union the assessors are merely called in to give the Judge technical assistance, whereas in South-West Africa the Judge and the assessors form the Court and the majority vote carries the decision. It would lead to a very difficult position if the presiding Judge was entitled to read the record but the other members of the same Court were not entitled to do so. It has been said that the reading of the record by the assessors may lead to prejudice or bias. I do not see how we can say that. The Legislature has formed the Court and given equal voting rights to each member; they must therefore have equal rights so far as reading the record is concerned. The special entry must be answered in favour of the Crown. There is another special entry, but it has not been pressed.

Stratford, J.A.; Roos, J.A., and Hutton, J.A., concurred.

Appeal accordingly dismissed.